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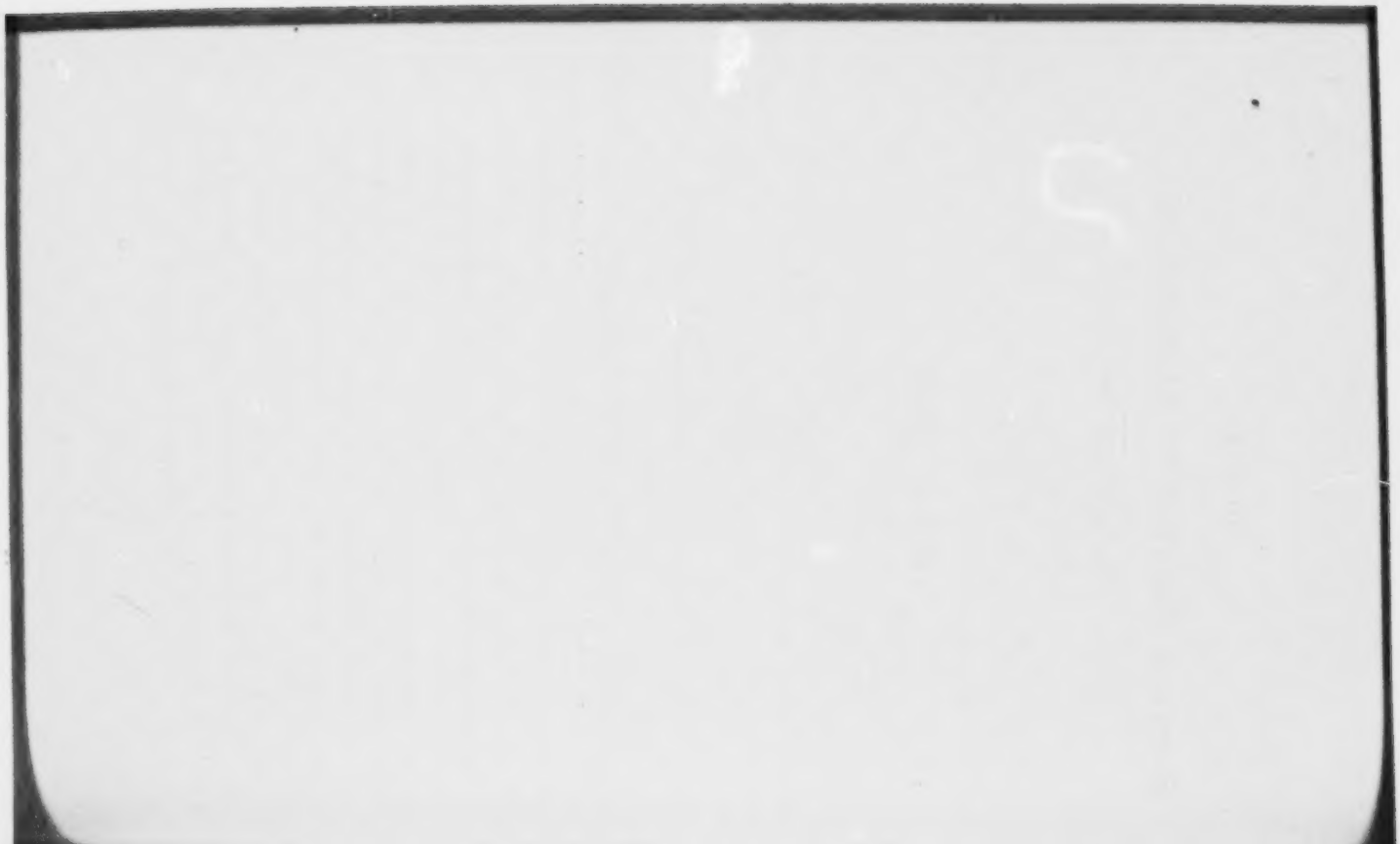

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

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No. 254

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OTIS & CO., *Appellant*,

v.

THE UNITED STATES OF AMERICA, THE PULLMAN COMPANY, PULLMAN-STANDARD CAR MANUFACTURING COMPANY, PULLMAN INCORPORATED, *et al.*

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## PETITION OF OTIS & CO. FOR REHEARING.

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Appellant, Otis & Co., hereby petitions this Honorable Court for a rehearing of this cause and for a reconsideration of the Per Curiam decision of this Court, without opinion, dated March 31, 1947, for the following reasons:

This case reached this Court on appeal, not by certiorari. The review came to the petitioners as of right; it was not granted at the discretion of the Court. The case belongs within that narrow category of causes so vitally affected with a public interest that the Congress has in respect to them imposed upon this Court the duty of ultimate decision.

The case is among the most important with which this Court has been confronted in recent years. It involves the future of the sleeping-car business; presents the question of whether the railroad industry is to be open to invigorat-

ing enterprise or to have its pattern frozen into status; raises the issue of how broad or narrow is the equity power when invoked to end restraint of trade. The case poses the problem of whether a federal court after affirmatively finding a violation of the antitrust law may, in formulating its decree, ignore all evidence which concerns the dissipation of the consequences of the monopoly and decline to consider which, among alternate plans, is the most effective measure against its return.

This case also raises another issue of utmost importance in respect to the relation of a court of equity to the Interstate Commerce Commission. In the interval between the judgment of the lower court and the review of this case by this Court, the Railroad Buying Group has attempted to invoke the jurisdiction of the Interstate Commerce Commission in respect to the future operation of a property still awaiting ultimate disposition in the federal courts.

The Railroad Buying Group contended on brief and oral argument before this Court that "the order below should * * * be affirmed without consideration of the antitrust and public interest issues raised by the appellants". An affirmance without an opinion will be a source of continued confusion because no one will know the weight which the Court gave to this argument. If the argument is valid it means that the District Court loses jurisdiction to the Interstate Commerce Commission because the power of the court is at an end when the Commission approves the acquisition. It means that the injunctive provisions of the decree can no longer be enforced by the court and can be modified at any time by the Interstate Commerce Commission if that Commission found it was in the public interest to do so. The end result of this argument, the validity of which is left in doubt, would be the complete nullification of the decree of the District Court by terminating its jurisdiction over the subject matter.

The Examiner has held in the proceeding now pending before the Interstate Commerce Commission that an appli-

cation under Section 5(1) of the Interstate Commerce Act justifies the Commission's approval not only of the so-called pooling arrangements but also of the acquisition of the capital stock of The Pullman Company. The Railroad Buying Group admits that the Commission has no direct authority to approve the acquisition of The Pullman Company stock since it is not a carrier under Section 5(2) which deals with the approval of acquisitions. However, they assert an indirect authority by implication to approve the acquisition as an incident to the pooling arrangement.[1]

This contention has been upheld by the Examiner for the Interstate Commerce Commission. If the Commission affirms, the possibility of effective review of its action either by the Government or Otis & Co. is doubtful. There is doubt that the Government can review the order of the Commission because, by statute, suits challenging an order of the Commission must be brought against the United States.[2] It is equally doubtful if Otis & Co. can challenge the order of the Commission. Furthermore, in the light of the decision in *United States* v. *Southern Pacific Company*, 290 Fed. 443, there is doubt whether the United States can move to enforce the injunctive provisions of the decree against the order of the Commission that the antitrust

[1] The brief of the Buying Group states its position as follows:

> "If the Commission grants the authority sought in the proceeding now pending before it, all grounds here urged for reversal of the order under review will have vanished. There will then be an administrative determination—binding and conclusive unless set aside by the courts in a direct attack on the order—that the pooled operation of the sleeping car business by appellee railroads in the manner proposed will be in the interest of better service to the public and will not unduly restrain competition. The transaction will then be 'relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law' by virtue of the express provisions of paragraph (11) of Section 5." (Pg. 19)

[2] 28 U. S. C. A. 43, 46 and 47; 38 Stat. 219; 36 Stat. 542, 1149; 38 Stat. 220.

laws have been suspended with relation to the acquisition which it has approved.

This anomalous situation is created by the absence of an opinion, despite the fact that no question involving the Interstate Commerce Act, or its interpretation, was before the District Court and consequently the only question on appeal here was the standards to be applied by the District Court in selecting a purchaser for The Pullman Company.

The absence of an opinion strips the judgment of any rationale and leaves the law in confusion. Since the result of the Court's decision may be to fasten a regulated railroad monopoly upon the sleeping-car business, it is imperative that the traveling public as well as the more immediate parties—successful as well as unsuccessful—should know the reasons which support its judgment. If the eight Justices who sat were upon first impression evenly divided, it is hard to believe that they were evenly divided upon every one of the many issues which the case presents. It is still harder to believe that they would have remained evenly divided after that critical scrutiny which it is the very purpose of the appeal granted by the Congress to assure. A number, if not all of the issues, might be resolved by the consideration usually accorded a case of like importance.

As it now stands, four Justices have found error in the judgment below; and it is hard to believe that the four others—or any one of them—who have voted to affirm that judgment bases his concurrence upon the narrow conception of the equity power in antitrust upon which the District Court rested its decision.

The holdings of the District Court that the sale of The Pullman Company is "the by-product," not the "end product," of the antitrust suit; that equity must not presume to make a business judgment; and that the adjudged malefactor has a legal right to install his successor are too destructive of the objectives of the antitrust laws to be given even the qualified approval which the judgment just set down accords them. Such rulings are utterly contrary to a

long line of decisions of this Court. See the list of cases, cited in appellant's briefs, from *United States* v. *American Tobacco Co.*, 221 U. S. 106, through *Atlantic Coast Line Railroad Co.* v. *Florida*, 295 U. S. 301 and *Virginian Railway Co.* v. *System Fed. No. 40*, 300 U. S. 515 to *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. We cannot believe that this Court is of opinion that this long line of cases no longer states the law. Yet, in the silence of this Court, such is the result. If other reasons impelled this Court to its decision, we respectfully submit that it should make clear that its affirmance is not to be interpreted as a prohibition against an effective use of the equity power to make whole that which has been seriously injured by monopoly and restraint of trade.

We submit that questions affecting alike the national economy, the line between judicial and administrative control, and the breadth of the equity power as applied in anti-trust cases are far too important to rest upon the cryptic line of "Affirmed by an evenly divided Court".

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted.

**CERTIFICATE.**

We, the undersigned attorneys for the petitioner above named, certify that the foregoing petition is presented in good faith and not for delay.

Respectfully submitted,

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